it has conducted only a handful of signal measurements. The so-called "crisis" of which the satellite industry now complains is one of its own making. That industry's crisis is self-inflicted. The "train wreck" to which Chairman Kennard has referred is one created by the satellite industry and by no one else--and it results from the satellite industry's gross indifference to the law. The satellite industry's indifference has apparently been grounded in the belief that if it violated on a massive scale, Congress or the FCC--or someone in Washington--will ultimately excuse that industry from having to obey the law. We do not believe this is an ethic on which sound public policy is made.

Unlike the plaintiffs in the Miami case, the plaintiff in the North Carolina case alleged that PrimeTime 24 had engaged in a "pattern or practice" of violations (in addition to "individual" violations) and requested--and the North Carolina court granted--a permanent injunction revoking PrimeTime 24's compulsory license to deliver ABC Network programming in the Raleigh-Durham market. Congress intended for the courts to deal harshly with satellite carriers that violated the limits of their compulsory copyright license on a massive scale. Congress *mandated* revocation of the compulsory license (just as the FCC does in the case of its licensees) when the holder of the license reflects a "pattern or practice" of violations of law.[41] The revocation is mandatory, not discretionary, under the Act--so the North Carolina court did precisely what Congress required of it. Accordingly, the North Carolina court did not have the occasion or need to employ Longley-Rice maps for purposes of enforcing its injunction.

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[41] *See* 17 U.S.C. §119(a)(5)(B)(ii).

EchoStar asserts that "a model predicting Signal B (sic) intensity . . ." is "necessary" to implement the Act.[42] That is not true. Had Congress intended that to be the case, it would have said so in the Act. Nor did the Miami nor North Carolina court hold that a "predictive" methodology was essential to enforcement of the SHVA. The Miami court, as noted earlier, used the Longley-Rice predictive methodology--at the plaintiffs' recommendation--to lessen the testing burden for the satellite carrier. There is nothing in the statute that requires it. The North Carolina court, given the nature of the relief requested and the evidence before it, had no need to address the issue.

In short, there is no conflict of any kind between the decision by the Miami and North Carolina federal courts. EchoStar's assertion to the contrary reflects a fundamental misunderstanding (or intentional mischaracterization) of the holdings of the courts.

C. The Act Incorporates And Adopts The Commission's Existing Grade B Signal Intensity Standards

EchoStar argues further that the Commission "has the power to revise its numerical definition of Grade B intensity, and should do so at least in the long term."[43] However, it is clear on the face of the Act and from its legislative history that Congress did not intend for the Commission to redefine for purposes of the SHVA the intensity signal level required to be

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[42]EchoStar Petition at 6.

[43]EchoStar Petition at iii n. 3. EchoStar acknowledges that such an undertaking "may require careful, fully-informed and elaborate analysis" and, accordingly, asks for such relief in "long term." EchoStar Petition at iii n. 3. NASA respectfully submits that before taking action on any of the proposals in EchoStar's petition, the Commission must engage in "careful, fully informed and elaborate analysis." The issues at stake are far too important for the Commission to rush to judgment on any of them.

classified as a signal of "Grade B intensity."[44] The inclusion in the statute of the term "as" plainly suggests that Congress intended to incorporate and adopt the Commission's *then existing* Grade B signal definition. If Congress had intended for the Commission to redefine and rewrite "Grade B intensity" for purposes of the Act, it would have used the phrase "*to be*" defined by the Federal Communications Commission, rather than the phrase "as" defined by the Commission.

The Act's legislative history further confirms that Congress intended to incorporate and adopt the Grade B signal intensity standards then existing in the Commission's regulations. A Committee report accompanying the Act defines an "unserved household" as a "household that with respect to a particular network, (A) cannot receive, through the use of a conventional outdoor antenna, a signal of Grade B intensity (as defined by the FCC, *currently* in 47 C.F.R. Section 73.683(a)). . . ."[45] The use of the term "currently" confirms that Congress intended to adopt the Commission's specifications for Grade B intensity as they existed at that time.[46]

Moreover, there is *no* evidence in the text of the Act or its legislative history to suggest that Congress intended to authorize the Commission to change the signal intensity level of a Grade B signal for purposes of the Act. Had Congress intended to grant to the Commission the authority to redefine the "Grade B signal" standard, it would have expressly directed the Commission to initiate a rulemaking proceeding for that purpose. In fact, Congress did direct the Commission to take such action on a separate topic. The Act expressly directed the

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[44]The Commission is, of course, free to revise its signal intensity measurements for purposes of its own regulations.

[45]H.R. Rep. No. 100-887 (II) at 26. (Emphasis added.)

[46]*See CBS, Inc. et al. v. PrimeTime 24* at 16 - 17.

Commission to undertake an inquiry and rulemaking proceeding on the feasibility of imposing syndicated exclusivity rules on satellite carriers.[47] Thus, it is clear that when Congress wants administrative action to clarify a statute, it knows how to request it. Had Congress intended for the Commission to redefine the intensity level of a Grade B signal, it would have directed the Commission to implement a rulemaking proceeding. Congress did not do so in 1988 when the Act was adopted, nor did it do so in 1994 when the Act was amended.

The recent federal court ruling in the ABC case is dispositive of the question whether Congress intended to codify the Commission's existing Grade B signal intensity standards. The North Carolina court there held:

> "Although Section 73.683(a) concededly was drafted with other purposes in mind, *Congress can clearly adopt by reference, in whole or in part, any portion of the Code of Federal Regulations which it considers relevant in defining a new statutory term. It is apparent that Congress has done so here.* SHVA's reference to 'an over-the-air signal of Grade B intensity (as defined by the Federal Communications Commission)' most naturally refers to the dbu's required for a signal of Grade B strength for each particular channel."[48]

Accordingly, there can be no question that the signal strength standards in Section 73.683(a) have been codified for purposes of the Act and are not subject to revision by the Commission.

EchoStar cites two cases in support of its argument that Congress did not intend to "freeze" the then existing Grade B intensity standards for purposes of the Act: *Lukhard v. Reed*, 481 U.S. 368 (1987) and *Helvering v. Wilshire Oil*, 308 U.S. 90 (1939). In both cases, the

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[47]H.R. Rep. No. 100-887 (II) at 26.

[48]*ABC, Inc. v. PrimeTime 24*, Memorandum Opinion, at 13. (Emphasis added.)

Supreme Court addressed the issue whether an administrative agency could revise its interpretation of an undefined statutory term used in a statute administered by that agency after Congress either passed an amendment to the statute using the term or re-enacted the statute leaving the term undefined. In other words, the Court addressed the issue whether by enacting legislation using an undefined term with a particular administrative interpretation, Congress enacts that regulatory interpretation into law. In both cases, the Court found that Congress did not intend to enact the regulatory interpretation into law. Accordingly, the administering agency's reinterpretation of the term was permitted because it was not inconsistent with Congressional intent.[49]

Both cases are irrelevant to the issue now before the Commission for three reasons: First, the terms at issue in *Lukhard* and *Helvering* were ambiguous terms purposely left *undefined* by Congress.[50] In contrast, Congress has specifically defined the term "Grade B intensity" for purposes of the SHVA by reference to the Commission's rules.[51] Thus, unlike in *Lukhard* and *Helvering*, there is no question whether Congress enacted a particular definition into law. As the North Carolina court in the ABC case expressly held, "[i]t is apparent that Congress has done so here."[52]

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[49] *Lukhard*, 481 U.S. at 378; *Helvering*, 308 U.S. at 100.

[50] *Id.*

[51] *ABC, Inc. v. PrimeTime 24*, Memorandum Opinion, at 13 (holding that "Congress can clearly adopt by reference, in whole or in part, any portion of the Code of Federal Regulations which it considers relevant to defining a new statutory term . . . [i]t is apparent that Congress has done so here.").

[52] *Id.*

Second, in *Helvering* and *Lukhard*, the issue was whether an agency could redefine terms contained in a statute *administered by that agency*. An administrative agency has familiarity with and expertise concerning the statutes it is entrusted to administer and may interpret those statutes. In that circumstance, an agency's interpretation of those statutes is entitled to deference.[53] However, an agency does not have authority to interpret a statute it is not responsible for administering. Because the Commission is not authorized to administer the copyright laws, it is without authority to interpret the Copyright Act.

Finally, in *Lukhard* and *Helvering*, the Court allowed the agency's interpretations because they were consistent with Congressional intent.[54] The interpretation of "Grade B" proposed by the EchoStar is wholly inconsistent with the plain, unequivocal intent of Congress in enacting the Act. Congress and the courts have specifically stated that the SHVA was written to create a narrow, limited compulsory license for satellite carriers. The standard proposed by EchoStar would result in expansive compulsory copyright privileges. EchoStar's "interpretation" would undermine the integrity of the copyright local network stations have in their programming and would ultimately result in the dismantling of the network/affiliate system of free, high quality, over-the-air television--a system Congress explicitly sought to preserve and protect. "[A]dministrative constructions of [a] statute . . . that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement" must be "rejected."[55]

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[53] *Chevron*, 467 U.S. at 844-45.

[54] *Lukhard*, 481 U.S. at 378-79; *Helvering*, 308 U.S. at 100.

[55] *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 32 (1981).

Thus, EchoStar is mistaken when it asserts "As the Supreme Court's decision in *Lukhard* confirms, when Congress chooses to reference an agency's interpretation in a statute, it does so precisely because it does not want a definition set in stone, but rather wishes to marshal the agency's power to review and revise its interpretation and adapt it as circumstances warrant."[56] In the statute at issue in *Lukhard*, Congress did not "reference" an agency interpretation but rather left the statutory term completely undefined so that it could be interpreted consistent with Congressional intent by the agency charged with administering that statute. Accordingly, the *Lukhard* line of cases is inapposite to the issue before this Commission.

As additional evidence that Congress did not "freeze" the definition of Grade B intensity set forth in the Act, EchoStar notes that "there is no applicable model for predicting Grade B intensity in place and available to be 'frozen.'"[57] As EchoStar repeatedly acknowledges in its Petition, the definition of Grade B intensity set forth in the SHVA is based on actual signal strength measurements, not a predicted contour.[58] Thus, EchoStar is correct that Congress did not adopt a model for predicting Grade B signal intensity in the SHVA, however, it draws the wrong conclusion from this fact. The fact that there is no applicable model for predicting Grade B intensity is further evidence that Congress never intended for the Act to be enforced by reference to a predictive model and that, instead, it intended to enforce the Act by using actual signal strength measurements.

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[56]EchoStar Petition at 9.

[57]EchoStar Petition at 10.

[58]*See, e.g.*, EchoStar Petition at i, 11.

D. The Commission Has Neither The Authority Nor The Expertise To Administer The SHVA

Perhaps the best evidence that Congress did not authorize the FCC to redefine the term Grade B intensity is the fact that the SHVA is a copyright statute. Congress has not delegated any authority to the Commission to interpret copyright law or implement the Act. The expert agency in this matter, and the agency that has been chosen by Congress to administer copyright law, is the Copyright Office, not the Commission. However, in this instance, even the Copyright Office is not free to change the Congressional policy reflected in the SHVA. This is so because Congress struck the policy balance itself by incorporating a technical standard adopted by the FCC. Congress, plainly, did not intend to delegate the issue of how to define an "unserved household" to *any* administrative agency--Congress itself expressly defined the term in the statute.

Even should the Commission decide to redefine the term "Grade B intensity" as used in the Act, its redefinition and interpretation would not be entitled to deference by a court later called upon to enforce the Act. The basis of any court's deference to an agency interpretation of a statute is the agency's familiarity with and expertise concerning *statutes it is entrusted to administer*.[59] "When an agency interprets a statute other than that which it has been entrusted to administer, its interpretation is not entitled to deference."[60] As the Commission has no familiarity with nor expertise concerning copyright matters, the federal courts are the only forum for construing the statute and applying conventional tools of statutory construction.

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[59] *Chevron*, 467 U.S. at 844-45.

[60] *See Illinois Nat. Guard v. Fed. Labor Relations Authority*, 854 F.2d 1396, 1400 (D.C. Cir. 1988); *See also, NJ Air Nat. Guard v. Federal Labor Relations Authority*, 677 F.2d 276, 286 n.6 (3d Cir. 1982).

III. There Is No Valid Reason For The Commission To Redefine "Grade B Intensity"

Not only is the Commission without authority to amend the definition of Grade B intensity set forth in the SHVA, there is absolutely no legitimate public policy reason for it to do so. Despite EchoStar's claims to the contrary, no one will be disenfranchised from receiving network signals if the Act is enforced as written. Instead of promoting public welfare, the proposal set forth by EchoStar would eviscerate the Act and undermine and ultimately dismantle the national network/local affiliate distribution system--a system that Congress has noted has "served the country well."[61]

A. Response To Still Another EchoStar Misrepresentation--No One Will Be Disenfranchised By Enforcement Of The SHVA

EchoStar warns the Commission that, as a result of the recent injunction issued in Miami, "there is an immediate risk that hundreds of thousands of consumers will be barred from receiving a distant network signal even though they do not, in fact, receive a local signal of Grade B intensity."[62] This statement, however, mischaracterizes both the nature and effect of the Miami court decision.

Enforcement of the Miami court's injunction will result in the termination of *distant* network service only to those who are *illegally* receiving it. Subscribers who, in fact, cannot

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[61]H. Rept. 100-887 (II) at 20.

[62]EchoStar Petition at iv. Note that EchoStar's estimate that "hundreds of thousands" of consumers will lose network service is dramatically lower than the estimate set forth by the NRTC in its Emergency Petition. NRTC states that "literally millions" of consumers face termination of network service. *See, e.g.*, NRTC Emergency Petition filed in RM No. 9335 at ii. Neither EchoStar nor NRTC offers any support for these figures.

receive a measured signal of Grade B intensity will continue to be eligible to receive distant network service by satellite, just as they have always been. Moreover, those satellite subscribers whose illegal reception will be terminated by enforcement of the law, will *not* lose access to broadcast network services. By definition, subscribers who have been illegally provided distant network service are able to receive at least a Grade B signal off-the-air from a *local* network affiliate. Therefore, those subscribers will continue to receive network service--and receive it for free!

In addition, aside from whether a subscriber is eligible for satellite service under the Act, there are 10,838 cable systems passing more than 97% of the nation's homes--all of which deliver broadcast network programming.[63] There are 96,915,100 television households in the country.[64] Therefore, at most, there are fewer than 2.9 million television households that are not passed by cable. However, there are 5.1 million subscribers to the four DBS providers,[65] and, in addition to DBS subscribers, there are approximately 3 to 4 million other home satellite dish users.[66] Therefore, even assuming that *every* household that is not passed by cable is a satellite customer, the vast majority of these satellite customers could still receive *local* network signals from their local cable provider. Accordingly, it is clear that enforcement of the statutory terms of the

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[63] 1998 Television and Cable Factbook Vol. 66 at I-96; 1998 Biennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, *Notice of Inquiry*, FCC 98-37 (released Mar. 13, 1998) at ¶26.

[64] 1998 Television and Cable Factbook Vol. 66 at C-55.

[65] *Fourth Annual Report* in CS Docket No. 97-141 at ¶55.

[66] *Id.* at ¶69.

terms of the SHVA will not result, as EchoStar contends, in the "disenfranchisement" of network service from anyone.

B. A Weakening Of The Act's Network Program Exclusivity Provisions Will Destroy The Free, Over-The-Air Television Industry Resulting In Fewer--Not More--Programming Choices

EchoStar suggests that the Commission should redefine "unserved households" in order "to ensure as many households as possible have access to at least some network service."[67] This statement demonstrates a fundamental misunderstanding of the policies underlying the SHVA. It is clear from the legislative history that the Act was written in order to allow a *limited* number of Americans to receive broadcast network programming by satellite while at the same time preserving the network-affiliated relationship that is critical to the existence of free, over-the-air television.[68] The adoption of EchoStar's proposed contour standard would conflict with the stated Congressional objective of preserving free, universally available, over-the-air television for those who cannot afford to pay.

Congress recognized and acknowledged that the indiscriminate transmission by satellite carriers of duplicating broadcast network programming from distant network stations, if not checked, would undermine the economic foundation of and ultimately dismantle the national network/local affiliate distribution system. The rates paid by local advertisers for local commercials, the rates paid by national advertisers for national commercials and the compensation paid to local affiliates by their networks are all a function of the size of each affiliate's local

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[67]EchoStar Petition at 21.

[68]*See* H. Rept. No. 100-887 (I) at 8 (1988).

viewing audience. The correlation between a television station's viewing audience and its advertising rates is direct and immediate. That the importation of duplicating programming will destroy the economic foundation of local broadcast service is a bedrock principle of the Commission's broadcast regulatory policy. That policy is reflected in the Commission's longstanding network non-duplication and syndicated exclusivity rules for the cable television industry.[69] The Commission has stated the economic consequences succinctly:

> "Diversion imposes economic harm on local broadcasters. . . . A drop even a single rating point may represent a loss of ⅓ to ½ of a broadcaster's potential audience. Audience diversion translates directly into lost revenue for local broadcasters."[70]

The Commission repealed its cable television syndicated exclusivity rules in 1980.[71] Acknowledging that it had failed to appreciate the importance of these rules, it reinstated the rules in 1988, observing:

> "The reasoning that shaped the 1980 decision to repeal the syndicated exclusivity rules was flawed in two significant respects. First the Commission justified the rules' repeal based on an analysis of how their repeal or retention would affect particular competitors, rather than competition itself, in the local television distribution market. We now recognize that the focus of our inquiry was misdirected to the extent that it examined the effects of repeal or retention on individual competitors rather than on the manner in which the competitive process operates. Second, the Commission failed to analyze the effects *on the local television*

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[69]47 C.F.R. §§76.92 et seq. and 76.155 et seq.

[70]Report and Order Re Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity In The Cable and Broadcast Industries, 53 FR 27167, 64 RR 1818 (1988) at ¶41. Note: This Order contains an exhaustive discussion of the relationship between the cable compulsory license created by the Copyright Act of 1976 and the Commission's broadcast/cable television regulatory policy.

[71]*Syndicated Exclusivity*, 79 FCC2d 663 (1980).

> *market* of denying broadcasters the ability to enter into contracts with enforceable exclusive exhibition rights when they had to compete with cable operators who could enter into such contracts. . . . The incomplete 1980 analysis led the Commission to mischaracterize the role that exclusivity rules play in the functioning of the local television market."[72]

The Commission should not make the same mistake again.

EchoStar acknowledges that "the 'unserved households' restriction was also intended to serve other purposes, including the desire to avoid disruption of the network-affiliate relationship" but states that the Commission need not worry about this underlying policy because "[t]hat consideration was not implicated in the SHVA's specific referral to the Commission's expertise and does not lie within that expertise: rather, it can be appropriately considered and weighed by the Copyright Office or the courts." Moreover, EchoStar claims that "even if the Commission were to weigh itself the desire to avoid disruption of the network-affiliate relationship, the overriding consideration would still be ensuring that network service is available to as many Americans as possible."[73]

The Commission should not be fooled by these arguments. The "unserved household" definition is the crux of the SHVA. The extent of the compulsory copyright license set forth in the Act depends entirely on the number of households that are "unserved." Any action that the Commission takes which alters this definition will impact the copyright privileges of network stations and their local affiliates. If the Commission adopts the predicted contour standard

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[72] *Program Exclusivity in the Cable and Broadcast Industries*, 3 FCC Rcd 5299, 64 RR2d 1818, 1828 (1988), *on recon.*, 4 FCC Rcd 2711 (1989), *aff'd sub. nom., United Video, Inc. v FCC*, 890 F.2d 1173 (D.C. Cir. 1989).

[73] EchoStar Petition at 21 n. 45.

proposed by EchoStar, the geographical area in which broadcast stations receive exclusivity protection under the Act will be constricted and, in turn, the economic foundation of the network/affiliate distribution system will be undermined. The Commission cannot act without implicating this crucial relationship.

Moreover, the Commission cannot, as EchoStar contends, decide whether the policy of providing network service to the maximum number of Americans outweighs the policy of preserving our nation's system of free over-the-air television. The policy balance struck in the SHVA was determined by Congress and the Commission has no authority to upset this balance. "The Commission is not free to circumvent or ignore that [policy] balance. Nor may the Commission in effect rewrite this statutory scheme on the basis of its own conception of the equities of a particular situation."[74]

[74] *Southwestern Bell*, 43 F.3d at 68.

IV. Conclusion

For these reasons, NASA respectfully requests that the Commission dismiss EchoStar's Petition.

Respectfully submitted,

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